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In the

Supreme Court of the United States

OCTOBER TERM, 1963

No. 587

AMERICAN COMPRESS WAREHOUSE, DIVISION OF FROST-WHITED COMPANY, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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REFERENCE TO REPORTS OF OPINIONS IN COURT BELOW

The opinion of the Court of Appeals is officially reported at 321 F. 2d 547. Since this proceeding is in the nature of a petition for enforcement of an order of the National Labor Relations Board, there were no other lower court decisions or opinions.

JURISDICTIONAL STATEMENT

The opinion of the Court of Appeals was dated August 13, 1963. The Court of Appeals denied petition for rehear-

ing, without written opinion, on September 23, 1963. Certiorari jurisdiction is conferred upon this Court by 28 U.S.C. Section 1254 (1). This Court should exercise its jurisdication because the decision of the lower court is in conflict with a former decision of this Court, or, if not, this Court has never decided the precise and important question here presented.

QUESTION PRESENTED FOR REVIEW

Is an employee who during the course of a conversation makes an insubordinate expression of ingratitude for economic benefits previously bestowed upon him by his employer protected by the National Labor Relations Act from discharge because in the course of the same conversation such employee makes further statements reasonably indicating his militant predisposition toward unionism?

PERTINENT STATUTES

Section 8 (a) of Labor Management Relations Act, 1947, as amended, 28 U.S.C. 158 (a): "It shall be an unfair labor practice for an employer — (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7; *** (3) by discrimination in regard to hire or tenure of employment to encourage or discourage membership in any labor organization***."

Section 7 of Labor Management Relations Act, 1947, as amended 28 U.S.C. 157: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall

also have the right to refrain from any and all such activities except to the extent that such right may be effected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Sec. 8 (a) (3)."

Section 10 (c) of Labor Management Relations Act, 1947, as amended, 28 U.S.C. 160 (c): "***No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause***."

STATEMENT OF THE CASE

In the fall of 1961 petitioner failed to rehire six seasonal employees after the entry of a Board order directing a representation election and shortly before such election was actually held. In late September, 1961, petitioner discharged a year-round employee named Littleton, this discharge occurring shortly prior to the holding of the representation election. The National Labor Relations Board issued a complaint charging petitioner with violating Section 8 (a) (1) and 8 (a) (3) of the Act with respect to each of these seven employees. The Trial Examiner and the Board exonerated petitioner of any violation of the Act with respect to four of the seven employees but found petitioner guilty of discriminatory failure to rehire two of the seasonal employees and found petitioner guilty of discriminatory discharge of Littleton. The enforcement proceeding in the Court of Appeals resulted in the Court leaving undisturned the final order of the Board and the Court enforced the Board's order. This petition is limited solely to the employee named Littleton.

The factual situation out of which Littleton's discharge resulted is adequately described in that portion of the opinion of the Court of Appeals found on pages 128 through 130 of the Transcript of Record and the petitioner has no quarrel with the facts as stated by the Court of Appeals. In late September, 1961, about six weeks prior to a representation election, a supervisor opened a conversation with Littleton by asking Littleton what he thought about the Union. Littleton responded non-committally and the supervisor then reminded Littleton of certain insurance benefits which petitioner was then providing its employees, including Littleton, at the time of the conversation. At this point the conversation became heated and Littleton replied:

> "I said to him 'I get $2,000, Why you always telling me that?' I said, 'I put myself in the insurance. If you don't do something, I will do something for myself'."

The conversation was finally concluded by the supervisor telling Littleton he (the supervisor) didn't need a union and then telling Littleton that the conversation was to be considered as only between the two of them and the supervisor requested Littleton to say nothing to anyone else about the conversation.

The substance of the conversation between the supervisor and Littleton was reported by the supervisor to petitioner's general manager who, on the day following the conversation, called Littleton to his (The General Manager's) office and told Littleton he was being fired because of the conversation.

The Trial Examiner stated:

> "As a witness, Boone (the General Manager) claimed that he fired Littleton because the employee had been 'insolent' and 'insubordinate' to Dupey (the Supervisor) — apparently when he had objected to being reminded of benefits the company was providing.
>
> "The Trial Examiner finds no merit in Boone's claim as to his reason for discharging Littleton. The incident, trivial at most, was not precipitated by the employee, but by the Superintendent (the supervisor), when the latter pressed him, unlawfully, concerning his vote in a Board election and his feeling toward the Union." (Parenthetical phrases supplied).

The Trial Examiner then stated that he found that the real reason Littleton was discharged was because he was reported by the Supervisor to be a Union adherent. The Board adopted the recommended report of the Trial Examiner.

The Court of Appeals sustained the decision of the Board, saying:

> "Suffice it to say, that the evidence of the conversation and the coincidence of time of the election and other statements of pressure against the Union rather clearly light the inference drawn by the Board that Littleton was fired because of his militant pre-disposition toward unionism."

ARGUMENT FOR ALLOWANCE OF THE WRIT

The approach taken by the Board and the Court of Appeals to the discharge of Littleton does not reach the true issue and the real principle at stake. The rationale of the decisions rendered by the lower tribunals rests upon their reaching the conclusion that petitioner became aware of

Littleton's militant predisposition toward unionism as a result of the conversation between the supervisor and Littleton and therefore, the discharge, which petitioner admits was the result of the conversation, was prohibited by either Section 8 (a) (1) or Section 8 (a) (3) or both of the Act. Actually, the real issue is whether an employee who is known by management to be a union adherent is protected by the Act is openly expressing ingratitude for existing economic benefits conferred upon him by his employer.

The decision of the Court of Appeals is in direct conflict with the rationale of this Court expressed in *National Labor Relations Board v. Local Union No. 1229, International Brotherhood of Electrical Workers*, 346, US 464, 476; 74 S. Ct. 172, 178. There, this Court made it quite plain that employees are protected by the Act in making an attack upon the failure of an employer to provide *better* wages, hours or working conditions than those which prevail at the time such attack is made but the Court specificaly held that an attack by employees unrelated to wages, hours or working conditions is adequate cause for disciplinary discharge, even though a labor dispute exists and even though those participating in such an attack are union men and leaders in the labor controversy.

Petitioner readily concedes that if Littleton had made his statement *in reverse*, his discharge would have been prohibited; for example, if Littleton had said:

"I realize you give me $2,000 of insurance but I think we ought to get *more*," or "I am for the union because I want *more* benefits."

But Littleton, instead of complaining about *inadequate* wages, hours or working conditions, voluntarily chose to make a statement saying he didn't care whether the employer provided him with the insurance or not because if the employer did not provide him with it, he would provide it for himself.

If there was ever an appropriate factual situation to which the following language from *National Labor Relations Board v. Local Union No. 1229 supra*, should be applied, this case is certainly such a situation:

> "The fortuity of the co-existence of a labor dispute affords these technicians no substantial defense. While they were also Union men and leaders in the labor controversy, they took pains to separate those categories. In contrast to their claims on the picket line as to the labor controversy, their hand-bill of August 24 omitted all reference to it. It attacked public policies of the company which had no discernable relation to that controversy. ***The technicians, themselves, so handled their attack as thus to bring their discharge under Section 10 (c)."

So far as petitioner has been able to determine, this Court has never directly passed upon the sort of unappreciative conduct involved here; if the rationale of *National Labor Relations Board v. Local Union No. 1229*, supra, is not applicable, surely the fundamental right of an employer to administer discipline for this type of conduct should be expounded upon by this Court, rather than leaving the matter in the "no-man's" land brought about by uncertainty.

PRAYER

WHEREFORE, your petitioner prays that a writ of certiorari issue under the seal of this Court directed to the United States Court of Appeals for the Fifth Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said Court had in the case numbered and entitled on its docket No. 20,029, National Labor Relations Board, Petitioner v. American Compress Warehouse, Division of Frost-Whited Company, Inc., Respondent, to the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States; and that the opinion and decision of said Court relating to employee Littleton be reversed by this Court, and for such further relief as to this Court may seem proper.

Dated October 28, 1963.

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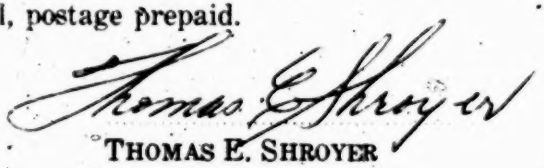
CERTIFICATE OF SERVICE

This is to certify that simultaneous with the filing of this petition a true copy was forwarded to each counsel of record for respondent by ordinary United States Mail properly addressed, postage prepaid.



THOMAS E. SHROYER
Counsel for Petitioner.

Appendix A

In the

United States Court of Appeals

For The Fifth Circuit

No. 20029

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

AMERICAN COMPRESS WAREHOUSE, DIVISION OF FROST-WHITED COMPANY, INC.,

Respondent.

Petition for Enforcement of an Order of the National Labor Relations Board, Sitting at Washington, D. C.

(August 13, 1963.)

Before RIVES, LEWIS,* and BELL, Circuit Judges.

LEWIS, Circuit Judge: The National Labor Relations Board found that respondent had violated Section 8(a)(1)[1] of the National Labor Relations Act by questioning its employees concerning their union sympathies and that it

* Of the Tenth Circuit, sitting by designation.

[1] 29 U.S.C.A. 158(a) "It shall be an unfair labor practice for an employer—

"(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title; . . ."

had violated Section 8(a)(3)[2] and (1) of the Act in discharging one employee, Littleton, and refusing to rehire two seasonal employees, Comick and Sims, because of their union affiliation. The Board seeks enforcement of its order requiring the employer to cease from infringing upon the rights of employees guaranteed in the Act and to reinstate with back pay the three employees whose rights were found to have been violated.

The respondent is engaged in compressing and warehousing cotton with plants in four cities in Louisiana. The two plants here involved are the Shreveport and Natchitoches plants, where United Packinghouse, Food and Allied Workers, AFL-CIO, began an organizational campaign in late 1960 and achieved a Board order on June 21, 1961, that a representation election be conducted. All of the events relied upon by the Board in its findings took place subsequent to the order and demonstrate the tension generated by the organizational attempt. The Board's determination that there existed Section 8(a)(1) violations was not excepted to below and hence is not here open for consideration, Section 10(e) National Labor Relations Act, 29 U.S.C.A. 160(e); *NLRB v. Ochoa Fertilizer Corp.*, 368 U. S. 318; 82 S. Ct. 344, 7 L. Ed. 312, but the evidence relating particularly to that charge forms a background and aids in the interpretation of the facts surrounding the discharge and refusal to rehire the named employees.

---

[2] 29 U.S.C.A. 158(a) "It shall be an unfair labor practice for an employer—

"(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization;

The respondent's business is largely seasonal. Although it regularly employs sufficient year-round workers to man the operation, respondent hires many more in the fall when the cotton is harvested and processed. The seasonal employees return year after year in the expectation of receiving employment during the season of full operation. In the fall of 1961, the hiring practices took on a different flavor when the seasonal employees were questioned as to how they felt about unionism and it was intimated that, if they "could forget about the union," work might be available to them. A plant superintendent told an employee that Comick was trying to organize a union at the plant and that he would never work there again. An employee working at the plant at that time was told that if he were for the union, he was "going to get messed up" and that he could only "tie" cotton and not put in more time on other jobs.

The discharge of Littleton was precipitated by a conversation between him and Dupuy, a plant superintendent. Dupuy opened the conversation by asking Littleton what he thought about this "damn union". Littleton responded noncommittally, and Dupuy continued to prod him, reminding him of the insurance benefits the company had given its employees. The conversation was heated and at this point, Littleton replied:

> "I said to him, 'I get $2,000, why you always telling me that?' I said, 'I put myself in the insurance. If you don't do something I will do something for myself'."

According to the company this statement was a shockingly insubordinate expression of ingratitude for which the company discharged Littleton the next day. Littleton, however, interpreted the entire conversation as an invasion of his rights to vote his convictions as to union representation:

> ". . . it was not because of the fact he asked me about the union, I know what he was asking was about the union, what way I was going to vote, and I didn't give him the decision he wanted."

Littleton's interpretation of the conversation is validated by its conclusion, which was reported by Littleton to be:

> "He said, 'Well, goddamn, I don't need the goddamn union. I don't need it. I will soon be ready to retire.' He turned off from me to go away and he said, 'Now, listen, this is only between me and you. Don't say anything to anybody about it'."

At the time Littleton was discharged he was told that this conversation was the cause. The company offers no further reason but insists that Littleton's subjective state of mind does not insulate him from the natural results of his insolent renunciation of company policies. It asserts that it could have no way of knowing how Littleton would vote in the upcoming election and that his discharge was not connected with the inquisition concerning the union being conducted at that time. Suffice it to say, that the evidence of the conversation and the coincidence of time of the election and other statements of pressure against the

union rather clearly light the inference drawn by the Board that Littleton was fired because of his militant predisposition towards unionism. See *NLRB v. Georgia Rug Mill*, 5 Cir., 308 F_2 89; *NLRB v. C. & J. Camp Inc.*, 5 Cir., 216 F_2 113.

During the summer of 1961, a new system of processing applications for employment was adopted by the respondent requiring that written applications be submitted on the form supplied by the company. Thus, several seasonal workers were called and invited to fill out an application form—in some instances, after they had been questioned on their attitudes toward the union. A wrong answer apparently disqualified them for work.

Sims, who had worked seasonally for 12 years, applied for work in the fall of 1961 on union stationery; he made a second application on the company form but was told by Superintendent Dupuy "You don't want to work for us if you are going to work for Homer Ford (an employee organizer) and the union." He was not hired and the respondent now maintains that he was rejected because of an illness resembling epilepsy which would endanger the plant and other employees. Significantly, he had passed required physical examinations for the preceding 12 years. *Cf. NLRB v. Griggs Equipment, Inc.*, 5 Cir., 307 F_2 275.

Respondent points out that there is nothing in the record to indicate that Sims was unusually active in the organization movement and that the respondent had hired several men who applied on union stationery. Although several conflicting inferences might be drawn from the evidence

concerning this employee, the Board chose to believe the testimony of Sims regarding the statement of Dupuy at the time of the refusal. There is substantial evidence throughout the record to support the Board's finding that the refusal to rehire Sims was discriminatory and in violation of Section 8(a)(3).

J. C. Comick, a seasonal employee like Sims, applied for work at both plants on union letterhead. He received no response and discovered from other employees that it was necessary to fill out a company application. However, by the time he was apprised of the new policy on hiring, the major seasonal hiring had been done, and he was informed that a superintendent had said of him,

> ". . . it looks like J. C. was trying to organize a union there and he never would work there no more."

During the late summer months of 1961 Comick was in fact acting as local representative to the union for the employees at the Natchitoches plant. Respondent asserts that other than the statement of the superintendent the record does not demonstrate that the company had knowledge of Comick's union activities. The statement is sufficient, without the inferences of the inherent probabilities, to sustain the Board's conclusion that Comick was not called by the company in accordance with its past practice because of his union activities.

Comick did not comply nor attempt to comply with the company's new procedures concerning seasonal employ-

ment, but the company was informed by reason of the union application that he was available for employment. Formerly, he had been sought out by the company even without the notice given by the union application. There is no suggestion in the record of a basic reason other than his union activities that would make him undesirable as an employee at this time. The finding of the Board with regard to the discriminatory nature of the refusal to rehire Comick is thus supported by substantial evidence on the record as a whole.

The Board's order will be enforced.

A true copy
Test: Edward W. Wadsworth
Clerk, U. S. Court of Appeals, Fifth Circuit
By Clara R. James
Deputy
New Orleans, Louisiana Oct. 8, 1963

Appendix B

In the

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 20029

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

AMERICAN COMPRESS WAREHOUSE, DIVISION OF FROST-WHITED COMPANY, INC.,
Respondent.

Petition for Enforcement of an Order of the National Labor Relations Board

(September 23, 1963)

ON PETITION FOR REHEARING

Before RIVES, LEWIS* and BELL, Circuit Judges.

PER CURIAM:

The Petition for rehearing in the above-styled and numbered cause is hereby

DENIED.

* Of the Tenth Circuit, sitting by designation.

Appendix C

In the

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 20029

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

AMERICAN COMPRESS WAREHOUSE, DIVISION OF FROST-WHITED COMPANY, INC.,
Respondent.

DECREE

Before: Rives, Lewis*, and Bell, Circuit Judges.

BY THE COURT:—

THIS CAUSE came on to be heard upon the petition of the National Labor Relations Board for the enforcement of a certain order issued by it against Respondent on June 28, 1962. The Court heard argument of respective counsel on May 1, 1963, and has considered the briefs and transcript of record filed in this cause. On August 13, 1963, the Court being fully advised in the premises, handed down its decision granting enforcement of the Board's order.

* Of the Tenth Circuit, sitting by designation.

ON CONSIDERATION WHEREOF, it is ordered, adjudged and decreed by the United States Court of Appeals for the Fifth Circuit that the said order of the National Labor Relations Board in said proceeding be enforced and that Respondent, American Compress Warehouse, Division of Frost-Whited Company, Inc., its officers, agents, successors and assigns abide by and perform the direction of the Board in said order contained.

ENTERED: SEPT. 27, 1963

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CITATIONS

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Universal Camera Corp. v. *National Labor Relations Board*, 340 U.S. 474 4

713-759—63

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 587

AMERICAN COMPRESS WAREHOUSE, DIVISION OF FROST-WHITED COMPANY, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 11–17) is reported at 321 F. 2d 547. The Board's Decision and Order are reported at 137 NLRB 980.

JURISDICTION

The decision of the court of appeals was entered on August 13, 1963. A petition for rehearing was denied on September 23, 1963, and the decree was entered on September 27, 1963 (Pet. 11, 19, 21–22). The petition for a writ of certiorari was filed on October 28, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether substantial evidence supports the Board's finding that petitioner discharged an employee because of his union sympathies.

STATUTE INVOLVED

The relevant statutory provisions are set forth at pp. 2–3 of the petition.

STATEMENT

Petitioner is a Louisiana corporation engaged in the warehousing and compressing of cotton (R. 43; B.A. 27–29).[1] Late in 1960, the United Packinghouse, Food and Allied Workers, AFL–CIO (the Union) began an organizational campaign among petitioner's employees. Throughout the campaign petitioner manifested its hostility to the Union, awarded positions to those employees who indicated that they "could forget about the Union," and threatened loss of work and less desirable jobs to those who continued their support of the Union (R. 45–46; B.A. 11–13, 18, 25–29).[2]

The present petition concerns only petitioner's discharge of one employee, Simon Littleton, less than two months before the date of a Board-conducted

[1] "R." refers to Volume I, Transcript of Record, printed for the use of the court of appeals; "B.A." refers to the Appendix to the Board's brief in the court of appeals. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

[2] Petitioner did not except to the Board's determination that such conduct violated Section 8(a)(1) (R. 46–57). Consequently, the court of appeals properly held that this issue was foreclosed (Pet. 12).

representation election. The circumstances surrounding this discharge, substantially undisputed, are as follows:

On September 26, 1961, Plant Superintendent Robert Dupuy approached Littleton and asked him, "What do you think of this damn Union?". When Littleton replied that he did not know, Dupuy countered, "Oh, hell, yes, you know about it." He added that "they" had been "working on it for a year," and with the time for voting drawing close,[1] Littleton "ought to know which way" he was going to vote (R. 47; B.A. 4). When Littleton again protested that he knew nothing about voting, Dupuy declared the Company had been "good" to the employees and had provided them with insurance and paid their doctor bills (R. 47; B.A. 4–5). Littleton replied, "[W]hy are you always telling me that? * * * I put myself in the insurance. If you don't do something I will do something for myself" (R. 47; B.A. 5). Dupuy then asked if Littleton had ever worked in a plant in which the employees were represented by a union. When Littleton replied that he had, Dupuy retorted, "Well, goddamn, I don't need the goddamn union. I don't need it." and he told Littleton that he should look for another job if he was dissatisfied. The conversation ended with Dupuy warning Littleton, "Now, listen, this is only between me and you. Don't say anything to anybody about it" (B.A. 5). The next day, September 27, petitioner's general manager, to whom Dupuy had related the conversation, called Littleton into his office and

[1] The election was to be held on November 17, 1961, and was, in fact, held on that date (B.A. 10).

discharged him. He then told Littleton that he was being discharged because he had "said some goddamn things to Mr. Dupuy that I don't like" (R. 47; B.A. 6-7).

Before the Board, petitioner claimed that Littleton had been discharged because, in the conversation with Dupuy, he had been insolent and ungrateful when reminded of the economic benefits which the Company had provided. The Board found that Littleton had in fact been discharged because of his support of the Union (R. 47–48). The court of appeals sustained the Board's finding (Pet. 14–15).[4]

ARGUMENT

1. Petitioner's contention that Littleton's discharge was attributable to his "openly expressing ingratitude for existing economic benefits conferred upon him by his employer" (Pet. 6) is contrary to the finding, made by the Board and sustained by the court of appeals, that Littleton was in fact discharged because of his union sympathies. An evidentiary issue of this kind, which turns largely on the credibility of witnesses, does not warrant review by this Court. *Universal Camera Corp. v. National Labor Relations Board*, 340 U.S. 474, 491.

In any event, it is clear that the record amply supports the Board's finding. Littleton was discharged the day after he had refused to join in Dupuy's condemnation of the Union. The court of appeals correctly concluded that the conversation with Dupuy, its proximity to the Board election, and the Com-

[4] The court of appeals also sustained the Board's findings that the other employees were discriminated against because of their union activity. (Pet. 15–17). Petitioner does not challenge the court's decision in that respect.

pany's "other statements of pressure against the union rather clearly light the inference drawn by the Board that Littleton was fired because of his militant predisposition towards unionism" (Pet. 14–15).

2. Petitioner's claim that the court of appeals' decision conflicts with *National Labor Relations Board* v. *Local Union 1229, IBEW*, 346 U.S. 464 (Pet. 7), is insubstantial. In that case employees were discharged for distributing handbills which disparaged the employer's product. The question before the Court was whether the distribution, "which had no discernible relation" (346 U.S. at 476) to the existing labor controversy, was protected by the Act. In the present case the conduct which, according to the Board's findings, caused the employee to be discharged, *i.e.*, expressions of sympathy with the Union, was clearly protected by the Act.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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NOVEMBER 1963.